

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Crim. No. 4-9-B-W
	)	
MICHAEL V. FOWLER,	)	
	)	
Defendant	)	

**RECOMMENDED DECISION ON MOTION TO SUPPRESS  
OUT OF COURT IDENTIFICATION**

This matter is before the court on the defendant's motion to suppress out-of-court identification. (Docket No. 58.) I held an evidentiary hearing on this motion on February 16, 2005. I now recommend that the court adopt the following proposed findings of fact and **DENY** the motion.

**Proposed Findings of Fact**

In August 2003 law enforcement officers in Boston, Massachusetts, recovered a firearm with an obliterated serial number in connection with an apparently unrelated criminal event. As a result of forensic testing in the Boston area the serial numbers were raised and then records were checked. It was determined that a John Clough of Lamoine, Maine, had owned the gun. Special Agent Oppenheim of the Boston area ATF office contacted Brent McSweyn, a Maine ATF agent, and made arrangements to come to Maine to interview Clough.

On September 3, 2003, McSweyn and Oppenheim visited Clough's home. John Clough was home alone at the time. Clough admitted to the officers that he had owned the gun at one time, but he had advertised it for sale in *Uncle Henry's* magazine and

ultimately sold the gun to a Michael Smith on December 7, 2002. Clough produced a bill of sale. (Gov't. Ex. # 1.) Clough indicated Smith had contacted him by telephone, apparently as a result of the ad. Clough did not know Smith but at the time of sale he had obtained identification from him, including an address in Springvale, Maine.

Oppenheim had prepared a photo array to show to Clough. Through independent investigation Michael Smith a/k/a Fowler had been connected to the firearm and therefore the officers included his picture among the six photos presented to Clough. (Gov't. Ex. #2.) Clough viewed the photo array without the officers making any comments regarding the sources of the photos or any other identifying information about the pictures. He was simply asked to indicate if he recognized anyone in the photo array. Clough circled the first picture as the person who had bought the gun. The photograph is not a picture of Michael Fowler.

When Clough's wife returned home the officers asked her to review the identical six photographs. Oppenheim rearranged the photo array and removed any identifying information that Mr. Clough had placed on the first photo he had identified. Mrs. Clough also did not receive any information regarding the sources of the photos and it was presented to her in the same manner as the first photographic array had been presented to Mr. Clough. Mr. Clough was asked to leave the room while his wife viewed the photographs. Both Mr. and Mrs. Clough had been present for the sale of the firearm and in fact Mrs. Clough had drafted the bill of sale for her husband. Mrs. Clough circled photo number six on the array presented to her, a picture of the defendant. (Gov't. Ex. 3.) Neither Mr. nor Mrs. Clough was informed he or she had identified different pictures or the "incorrect" photo nor was there any further discussion concerning their selections.

## Discussion

Fowler has moved to suppress evidence that a witness identified him during a pretrial identification procedure that he contends was impermissibly suggestive. United States v. Lopez-Lopez, 282 F.3d 1, 10 (1st Cir. 2002) (“Pretrial identification evidence is subject to constitutional limitations under the Due Process Clause.”) Motions of this nature are analyzed according to a two-pronged standard. United States v. Watson, 76 F.3d 4, 6 (1st Cir. 1996). First, the court must determine whether the procedure used to obtain the identification was impermissibly suggestive. Id. If it was, then the court must decide whether the identification itself was reliable under the totality of the circumstances, notwithstanding the suggestive identification procedures used by the police. Id. Before suppressing identification evidence, the court "must be persuaded that there was a very substantial likelihood of irreparable misidentification," United States v. De Jesus-Rios, 990 F.2d 672, 677 (1st Cir. 1993), and "only in extraordinary circumstances should identification evidence be withheld from the jury," Watson, 76 F.3d at 6.

I am satisfied that the procedures used and the photo arrays presented were not unduly suggestive. The six photos speak for themselves. The fact that Mr. Clough did not identify Michael Fowler as the gun’s buyer is strong circumstantial evidence that nothing in these pictures is suggestive vis-à-vis Fowler’s picture. The procedures used by the officers in presenting the pictures were equally nonsuggestive. Fowler makes much of the fact that Mr. Clough was asked to leave the room and therefore was not available as a “witness” to Mrs. Clough’s identification. The fact that both Mr. and Mrs. Clough viewed the photo arrays independently without opportunity to confer or “witness” each

other's selection demonstrates good police procedures, not suggestive ones. I see no reason to suppress Mrs. Clough's out of court identification of Michael Fowler.

### **Conclusion**

Based upon the foregoing, I recommend the court adopt these proposed findings of fact and **DENY** the motion to suppress out of court identification.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated: March 3, 2005

### **Defendant**

**MICHAEL V FOWLER** (1)  
*also known as*  
**MICHAEL W SMITH** (1)

represented by **JEFFREY M. SILVERSTEIN**  
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**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**  
*Designation: CJA Appointment*

**Pending Counts**

18:922G.F FELON IN  
POSSESSION - 18:922(g)(1) and  
924(a)(2)  
(1)

42:408.F - MISUSE OF SOCIAL  
SECURITY NUMBER -  
42:408(a)(7)(B)  
(2)

**Disposition**

**Highest Offense Level (Opening)**

Felony

**Terminated Counts**

None

**Disposition**

**Highest Offense Level  
(Terminated)**

None

**Complaints**

18:922G.F - Felon in Possession

**Disposition**

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**Plaintiff**

USA

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